IN THE

Supreme Court of the United States

October Term, 1961

No. 331

THE SHELL PETROLEUM CO., LTD., as owner of the
M/S LEMBELUS, *Petitioner*,

against

CHARLES PESCHKEN, *Respondent*,

and

CAROLUS V. HINES and FRED W. BENTS

MOTION AND BRIEF OF THE AMERICAN WATERWAYS OPERATORS, INC. AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATES JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The American Waterways Operators, Inc., respectfully moves this Honorable Court for leave to file the accompanying brief as *Amicus Curiae*. The consent of the petitioner has been obtained but the respondent has refused to consent to the filing of a brief by The American Waterways Operators, Inc. as *Amicus Curiae*.

Movant, The American Waterways Operators, Inc. (hereinafter called A.W.O.) has an interest in this case in that it acts as an agent through delegated authority from its membership. A.W.O. members operate vessels on navigable waterways throughout the United States. Some or all of these members are directly or indirectly confronted with the issues raised in this case as presented by petitioner, The Shell Petroleum Co., Ltd., as owner of the m/s LEMBULUS. Stated otherwise, the issues as thus presented are *not* confined solely to the interest of the above-mentioned petitioner, but are National in scope. In view of the posture of the law on this subject, the grant of certiorari is urgently requested due to the impact the decision of the Court of Appeals in the instant case will have on a National basis if permitted to stand.

Review of the case at hand is necessary due to the lack of a clear and definite statement of the law on the subject at issue, as a result of the confusion created by the decision of the Court of Appeals in the Third Circuit in this case. The duties and liabilities of the operators of bridges spanning heavily navigated waters throughout the United States is now a matter of complete confusion. Further, it appears from the testimony in petitioner's case that many bridge operators have come to understand that they may avoid liability for damage to passing vessels by refusing to give a "come ahead" or "all clear" signal to vessels signalling for passage notwithstanding the bridge may already be opening or may already be completely open. Such a practice is a perversion of signalling regulations duly established by federal authorities for the preservation of life and protection of property.

Most important, there is a lack of operational uniformity among bridge tenders located in the territory covered by the several Circuits, despite the fact that the same vessl on the same voyage may and frequently does pass under numerous bridges located in the several Circuits.

The decision of the Third Circuit Court of Appeals in petitioner's case precipitated this perversion and must be countermanded by this Court.

WHEREFORE, The American Waterways Operators, Inc. moves this Honorable Court for leave to file the attached brief as *Amicus Curiae.*

Respectfully submitted,

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September 25, 1961

BRIEF OF THE AMERICAN WATERWAYS OPERATORS, INC. AS AMICUS CURIAE

INTEREST OF AMERICAN WATERWAYS OPERATORS, INC.

The basic facts and questions presented in the instant case have been covered in substantial part by the petition for writ of certiorari filed on behalf of The Shell Petroleum Company, Ltd. To the extent that this is so, they will not be repeated here. There are other facets to the case, however, which The American Waterways Operators, Inc., (hereinafter called A.W.O.) as *Amicus Curiae* feels necessary to submit to this Honorable Court.

A.W.O. is the national association that represents small vessel operators throughout the entire United States. Through A.W.O., these operators present their cases to governmental agencies, State and Federal Courts in matters which are industry-wide in interest, and in this instance to this Honorable Court. The primary reason for this is to conserve time and expense of all involved and permit the judicial tribunal before which the matter is presented to receive the position of the industry in one simple, unadulterated document. It is respectfully submitted that although in the first instance the matter here in issue appears to be merely a contest between petitioner and respondent, in the final analysis it is a matter of National importance and the action this Honorable Court takes with respect to the matter will have a far reaching impact on the Nation, and on this industry whose members consist of some two hundred odd operators of vessels navigating throughout practically all inland rivers, the Great Lakes, the Gulf Intracoastal Canal, the Atlantic Intracoastal Canal, bays, sounds and harbors on all coasts and on the Columbia River system on the West Coast. From time immemorial and despite technological advances, transportation by water has been considered a business which involves more than the average business risk and,

cognizant of this fact, State and Federal governments have enacted numerous special laws affecting the industry. Categorically speaking, the subject of navigation is one of International import.

CONFLICT OF COURT DECISIONS

The instant case is on appeal from the Third Circuit. A reading of the petition for writ of certiorari shows clearly that the decision of the Court of Appeals is contrary to the doctrine of *The Pennsylvania*, 86 U.S. 125; *Merrill Chapman & Scott Corporation* v. *Cornell Steamship Co.*, 265 F. 2d 537 (1959) (2d Circuit); *The Fort Fetterman* v. *South Carolina State Highway Department*, 261 F. 2d 563 (1959) (4th Circuit); *The Majestic*, 80 F. 2d 879 (4th Circuit); *Circle Line Sightseeing Yachts* v. *City of New York*, 283 F. 2d 811 (2d Circuit); *Munroe* v. *City of Chicago*, 194 Fed. 936 (7th Circuit) cert. denied, 229 U.S. 609; *Clement* v. *Metropolitan West Side El. R. Co.*, 123 Fed. 271 (7th Circuit), all cited by Petitioner.

Further, the opinion of the District Court in this case set forth beginning at page 26, Appendix A of the above-mentioned petition, points out other cases in the Sixth Circuit and in the Seventh Circuit clearly establishing that a controversy exists between the opinion of the Court of Appeals in the instant case in the Third Circuit and opinions in other Circuits. It is respectfully submitted that this confusion must be resolved by this Honorable Court.

In addition to the cases cited hereinabove, from petitioner's brief and the decision of the lower Court clearly establishing the conflict created by the decision of the Circuit Court in the 3rd Circuit, an additional conflicting decision is to be found in the 9th Circuit, namely *The Eureka* 80 F. 2d 303.

An examination of the map of the United States, with particular reference to the navigable waterways and the

existence of hazardous conditions brought about by the erection of bridges and other similar structures built for the convenience of individuals or groups of individuals, will show that in the Second, Fourth, Sixth, Seventh and Ninth Circuits, vessel operating conditions are difficult. In the application of Federal Navigation Laws, uniformity under the law is most essential to the National well-being and National Defense. Therefore, the decision of the Court in the Third Circuit must be reviewed and reversed by this, the highest Court of our land.

Further, it is obvious from a reading of the pleadings in this case that confusion exists between Federal and State regulations, particularly with reference to requirements as to audible signals between vessels and bridge tenders. In many instances practice or indifference by bridge tenders as established by competent evidence in several cases modifies not only State but Federal regulations. Navigation throughout the United States cannot be conducted without standardization of the law on this point. Such standardization could be brought about by this Honorable Court.

It is submitted that the Court may take judicial notice of several facts. For example in the Chicago area, along the Illinois River and the Chicago River, waterways are literally covered with bridges and these waterways are perhaps the most highly travelled in the world. The unimpeded movement of water traffic in this area alone is necessary for the National economy. The same can be said for other Nationally strategic areas—New York (second circuit), Tennessee River (sixth circuit), West Coast (ninth circuit), New Orleans (fifth circuit).

The need for uniform, clear navigation rules, not modified by indifference or custom of bridge tenders or any other similar employee, is absolute. This Honorable Court should not permit any lack of uniformity on this matter to continue.

In passing it should be mentioned that on July 7, 1961, the same bridge which is involved in the instant case caused a similar accident. The same agent was involved and one of our busiest waterways found its usefulness again impaired because this same bridge tender did not respond with any audible signal to the vessel "PLATIDIA" seeking passage. In this instance it appears that some eight or ten minutes elapsed before the bridge began to rise after the signals given by the "PLATIDIA" and that the bridge tender gave no signal even though he could see that navigating conditions at that time were difficult, if not dangerous.

NATIONAL DEFENSE

That our national welfare depends upon the granting of the instant petition can clearly be shown by a brief reference to a recent unfortunate accident which occurred upon a most important navigable waterway.

On or about July, 1961 the "Wheeler Dam" on the Tennessee River collapsed. Navigation between the upper and lower part of the river was therefore brought to a standstill. As this Court is well aware, the United States government for its own self preservation and the preservation of the Democratic countries of the world, is required to go forward with the construction, testing and firing of missiles of various types. The Court may take judicial notice of the fact that one of our most promising missiles--the one by means of which we propose to reach or approach the moon—is constructed in Huntsville, Alabama. It can only be put in operation at our established operating base, Cape Canaveral, Florida, and the only way this missile can move is by water. The impediment to navigation on the Tennessee River has retarded our progress, and therefore, if we risk losing the use of our navigable streams through incidents such as involved in the LEMBULUS matter, our national existence may be in jeopardy.

There can be no doubt that this Honorable Court is well aware of the activity of the Federal government in World War II, with particular reference to the construction of naval craft and other armament for the successful prosecution of that worldwide conflict. Hundreds of large naval craft such as submarines, destroyers and destroyer escorts were constructed on the Great Lakes and were towed to the open Gulf by some of the inland vessels represented by A.W.O. for active service. The biggest problem which had to be resolved in order that this program might be put into effect was the question of liability which might be incurred because of the method of bridge operation in the Chicago area.

The obstacles to this national defense program were finally overcome but the towing was at first undertaken by one operator only, namely, the Federal Barge Lines. The Federal Barge Lines at that time was a government-owned corporation and to protect these valuable navy vessels it was a self-insurer. The other lines at least in the beginning could not assume this risk primarily because of the Chicago bridge situation.

It is respectfully submitted that this clearly demonstrates that navigation throughout the United States should be free of impediment, and obligations should not be placed on vessel operators based on facts such as involved in the *Lembulus* matter.

THE NATIONAL TRANSPORTATION POLICY

This court has had presented to it on occasions too numerous to mention the obligation of the Government and of this court under Section 500 of the Transportation Act of 1920 (US Code, 49 USC Section 142), and the national transportation policy which strengthened the 1920 Act. The national transportation policy was enacted in 1940 as a preface to the Interstate Commerce Act (49 USC., preced-

ing Sections 1, 301, 901, and 1001). Section 500 of the 1920 Act requires government agencies, Federal courts and this Honorable Court "to promote, encourage and develop water transportation services and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation". The national transportation policy referred to in essence imposes the same obligation and at the same time strengthens and reemphasizes the 1920 Act. These policies are paramount to the interests of any individual, corporation, or even a Sovereign State of the United States.

This court is too well aware of its findings in its decisions which clearly establish the paramount nature of our national transportation policy and the rights of vessel operators thereunder to quote even so much as one sentence from any of these decisions. Suffice it to cite on this point the leading cases establishing this doctrine. The first or most outstanding case is *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947). This was followed by a broadening of the application of the policy in *James McWilliams Blue Line* v. *United States*, 100 F. Supp. 66 (S.D.N.Y. 1951), *affirmed* 342 U.S. 951 (1952). This unbroken line of decisions continues with *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956). Subsequent decisions of the lower courts and of this court have followed the same doctrine.

In view of the above, it is respectfully submitted that the instant proceeding is one which requires attention from this court not only as a matter of national defense but as a problem arising within the doctrine of our national transportation policy.

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

/Sgd/ John H. Eisenhart, Jr.

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Dated at
Washington, D. C.
September 25, 1961.

Certificate of Service

This is to certify that I have today served three copies of this document on David D. Furman, Esq., Attorney General of New Jersey, State of New Jersey, State House Annex, Trenton, New Jersey and Robert M. Julian, Esq., Haight, Gardner, Poor & Havens, 80 Broad Street, New York, New York.

/Sgd/ John H. Eisenhart, Jr.

JOHN H. EISENHART, JR.